

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C.**

In the Matter of)	
Request for Review by new Florence)	
Telephone Company (SAC 421927) of)	
Decision of Universal Service Administrator)	CC Docket No. 96-45
Regarding Suspension of High Cost Universal)	
Service Support Payments and Request for)	
Preemption of the Missouri Public Service)	
Commission		

REPLY COMMENTS OF NEW FLORENCE TELEPHONE COMPANY

New Florence Telephone Company ("New Florence"), by its attorneys and pursuant to 47 C.F.R. §§ 1.415 and 1.419, hereby files these reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") Public Notice in the above-referenced matter.¹ Specifically, New Florence responds to the comments filed by the Public Service Commission of the State of Missouri ("MoPSC"), which were the only comments filed in response to the Public Notice. With the submission of those comments, the record now unequivocally demonstrates that i) the FCC erred in immediately terminating Universal Service Fund ("USF") support for 2004; ii) the MoPSC in fact had no basis for withholding certification of New Florence for USF support for 2005; iii) that the FCC and the MoPSC have combined to deprive New Florence of a property right without due process; and iv) that withholding high cost support while finding New Florence eligible to continue to receive low income support is arbitrary, capricious and an abuse of discretion.

¹ *Wireline Competition Bureau Seeks Comment on Appeal of New Florence Telephone Company Concerning a Decision of the Universal Service Administrator to Suspend its High-Cost Universal Service Payments*, CC Docket No. 96-45, Public Notice, DA 04-3948 (December 17, 2004).

I. High Cost Support Is Due New Florence for the Remainder of 2004

As detailed in its Appeal,² New Florence was properly certified for USF support for calendar year 2004 and the MoPSC action in withholding certification was prospective only relating solely to 2005. As a result, New Florence submits that it should have continued to receive high cost support payments for the provision of universal service from September 2004 through the end of December 2004 regardless of any MoPSC decision to withhold certification for 2005. New Florence was properly certified by the MoPSC for the 2004 calendar year in 2003 and should be lawfully reimbursed for its provision of high cost universal service for September, October, November, and December of 2004. In its comments, the MoPSC made it abundantly clear that its action was, as New Florence had submitted, intended only to be the withholding of the October 1, 2004 certification required for calendar year 2005 support. “[T]he MoPSC’s decision to decline certification *for funding year 2005*”³ should have had no impact on New Florence’s receipt of USF funds for the remainder of 2004. Accordingly, the MoPSC withholding of certification had nothing to do with New Florence’s USF eligibility for calendar year 2004. New Florence therefore requests that the FCC immediately instruct USAC to immediately distribute USF funds due to New Florence for the balance of 2004.

II. The MoPSC Erred in Withholding Certification for New Florence

The New Florence Appeal postulated that USF certification was being withheld as a result of a degree of indirect common ownership between Cass County Telephone Company and New Florence. While the MoPSC goes to great length to try and establish another basis for the

² Letter from Michael K. Kurtis, Counsel for New Florence Telephone Company, to Jeffrey J. Carlisle, Federal Communications Commission, filed December 1, 2004 (“Appeal”).

³ Comments of the Public Service Commission of the State of Missouri (“MoPSC Comments”) at 5 (emphasis added).

decision to withhold certification, in the end, the MoPSC comments make it abundantly clear that the decision was not based upon any allegations of specific wrong doing or misuse of funds on the part of New Florence, but rather on the common ownership.

Unfortunately, in striving to present “other facts” that led to the withholding of the October 1, 2004 certification, the MoPSC was less than fully candid with the Commission. For example, the MoPSC refers to data request responses as further support for its decision to withhold certification. One such example from page 10 of the MoPSC comments states:

The MoPSC Staff asked New Florence to describe the safeguards in place for affiliate transactions. LEC, LLC objected to the request as vague, overbroad and seeking information not in the possession and control of New Florence. The safeguards employed by LEC, LLC were described as irrelevant to New Florence’s regulated operations despite the fact that New Florence is making significant annual payments to LEC, LLC.

Careful reading of the MoPSC statement, which was submitted in an effort to establish some additional basis for the MoPSC decision to withhold certification, makes it clear that the MoPSC is continuing to bundle New Florence with other parties, and then using that bundling to taint New Florence by association. First, the MoPSC seeks to indict New Florence for objections and data request responses filed by LEC, LCC and *not* New Florence. Second, the MoPSC neglects to advise the FCC that New Florence served with a similar data request, filed no objection and responded with the simple factual statement that no such agreement existed. Third, and perhaps most disappointing, the MoPSC neglects to advise the FCC that the series of data requests served on New Florence seeking to elicit this information, were not even issued by the MoPSC until nearly a month *after* the MoPSC letter withholding certification. With the data requests in question not having been served on New Florence until October 27, 2004, New Florence’s response, purported as an underlying basis for MoPSC September 30, 2004 action, was not actually submitted until November 16, 2004, some seven weeks *after* the MoPSC decision to

withhold certification. Suffice it to state that the New Florence November 16, 2004 responses to the MoPSC Staff October 27, 2004 data requests played absolutely no role in leading to the MoPSC's decision to withhold certification. In point of fact, while to date there have been 38 data requests served on New Florence, all but 12 of those requests were issued *after* the MoPSC action withholding USF certification for 2005.⁴

Significantly, the MoPSC does acknowledge that it has now received the third party audited financials for New Florence.⁵ What MoPSC neglects to state is that those audited financials show no misuse of USF funds.⁶ Instead, the MoPSC attempts to paint a picture of improper affiliated transactions. For example, the MoPSC advises that the largest affiliated transactions occurred between New Florence and LEC, LLC.⁷ What is most significant is, again, that which the MoPSC neglected to tell the FCC. First, there is no indication that any payments made to LEC, LLC were in any way inappropriate or at other than arms length rates. Second, that upon taking over as President of New Florence, Mr. Williams immediately began transitioning the services provided by LEC, LLC to other entities to avoid any appearance of

⁴ Significantly, all but the first five MoPSC data requests were issued with response dates that fell *after* the MoPSC's denial of certification. Rather than acting in the obstructionist manner implied in the MoPSC comments, New Florence responded to all MoPSC data requests then in its possession before September 30, 2004, including data requests 6 through 12 which were only issued by the MoPSC Staff on September 22, 2004 and therefore had a response date of October 12, 2004.

⁵ "MoPSC Staff received the New Florence third party audit December 23, 2004." MoPSC Comments at p. 7.

⁶ New Florence deems this information to be confidential in nature but will make a copy of that audit available to the FCC for *in camera* inspection, should the FCC so request.

⁷ MoPSC Comments at p. 10.

impropriety.⁸ Third, that as of January 1, 2005, LEC, LLC no longer provides **any** services to New Florence. Accordingly, even if there had been an issue as to the propriety of the fees paid to LEC, LCC, **and there has been none**, the MoPSC is well aware that LEC, LCC will not be providing any such services to New Florence at any time during 2005. Accordingly, payments for services to LEC, LLC for 2005 **cannot** form the basis for the MoPSC to withhold USF certification for 2005 since no such services are being performed by LEC, LLC for New Florence in 2005.

New Florence has never challenged the appropriateness of the MoPSC to conduct a full investigation into all matters relating to alleged criminal misconduct on the part of indirect minority owners in New Florence. To the extent that such an investigation includes New Florence – that is fine. The allegations cited by the MoPSC against certain of the minority shareholders are of a serious nature and warrant full investigation.⁹ What New Florence objects to is the MoPSC using “guilt by association” as the basis for severing critical USF support to New Florence while the MoPSC takes months to conduct its investigation.¹⁰ The MoPSC, aside

⁸ As the FCC and the MoPSC are well aware, service such as billing and collection, which were being provided by LEC, LLC, require time to transition to new providers.

⁹ New Florence notes that on January 7, 2005, Cass County Telephone executive Kenneth Matzdorff pleaded guilty in federal court in New York to certain conspiracy charges. Attached as Exhibit 1 is the MoPSC press release regarding to this matter. Mr. Matzdorff is a minority shareholder of a corporation that owns New Florence and, as the MoPSC acknowledges in its Comments, was removed from all day-to-day operations and management of New Florence in August 2004, nearly 2 months before MoPSC action withholding USF certification for 2005. Absolutely no allegations have even been raised against Mr. Robert Williams, the individual in total control of New Florence since that time and who will oversee all use of 2005 USF support.

¹⁰ On Friday, January 14, 2005, the MoPSC issued an *Order Establishing Investigation Case* Case No. TO-2005-0237 (Rel. January 14, 2005), (“Investigation Order”), a copy of which is appended hereto as Exhibit 2. That Investigation Order makes it clear that New Florence is being investigated because it was one of several “...other companies associated with Mr. Matzdorff.” Investigation Order at p 2. The inclusion of New Florence in that investigation

from making the conclusory statement that it has “...sufficient basis upon which to decline to certify by October 1, 2004, that New Florence would use Federal Universal Service Fund high cost support in accordance with section 254(e) of Telecommunications Act of 1996 (47 USC §254(e)),”¹¹ offers neither factual support nor legal authority for that position. Most disappointing is the cavalier position advanced that if the MoPSC investigation results in finding that New Florence has not misused the USF Funds, the MoPSC will simply issue its certification at that time.¹² The reality is that New Florence, and more importantly its subscribers, are being denied access to funds essential to New Florence’s ability to provide affordable telephone service in the high cost area served by New Florence. There are, of course, no competitive local exchange carriers in the New Florence service area. Understandably, the MoPSC offers absolutely no legal support for its position, despite the FCC’s expressed request in its public notice seeking comment that such legal precedent be provided.

III. The FCC and the MoPSC have Combined to Deny New Florence of a Property Right Without Due Process

A. High Cost Support Has Been Treated as “Property” in FCC Cases

High cost universal service support payments are “property” pursuant to the Fourteenth Amendment’s due process clause¹³ and pursuant to a Fifth Amendment takings analysis. The

because of that association is *not* at issue. What is at issue is the immediate termination of USF support for New Florence simply because of that association. The Investigation Order should remove any doubt that the withholding of New Florence’s USF certification was anything other than a presumption of guilt by association.

¹¹ MoPSC Comments at p. 10-11.

¹² MoPSC Comments at p. 11.

¹³ The hallmark of property under the Fourteenth Amendment’s due process clause is individual entitlement grounded in state law which cannot be removed except for cause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See also, Lujan v. G&G Fire Sprinklers*,

status of high cost support as property was addressed in *Texas Office of Public Utility Counsel v. FCC*.¹⁴ In that decision, the U.S. Court of Appeals for the Fifth Circuit analyzed contributions to the federal high cost support mechanism as property based on a Fifth Amendment takings argument, ultimately ruling that until the property is taken and there is no compensation by the state, the claim is not ripe for judicial review.¹⁵ Distinguishing this result from the case of New Florence, New Florence had already been receiving USF support. The FCC order, based upon the MoPSC withholding its certification, instructing USAC to withhold high cost support payments that would have continued to compensate New Florence for its provision of universal service, constitutes a termination of such support. What is clear from *Texas Office of Public Utility Counsel v. FCC* is that universal service should be examined from a property rights standpoint once it has been granted and subsequently taken, as it has been in the instant case.

In *Alenco v. FCC*, the Fifth Circuit took its universal service/property analysis one step further, concluding that high cost universal service support *payments* to carriers are property to be analyzed pursuant to the Fifth Amendment takings clause.¹⁶ In the instant case, these very same high cost support payments due to New Florence are the subject of the dispute. What was in dispute in *Alenco v. FCC* was *not* whether universal service support payments are property, but whether government action had led to a taking of universal service support payments that

Inc., 532 U.S. 189, 196 (2001) (ruling that a state's withholding of expected payments for labor and services was a property interest).

¹⁴ *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 425 (5th Cir. 1999).

¹⁵ *Id.*

¹⁶ *Alenco v. FCC*, 201 F.3d 608, 624 (5th Cir. 2000).

were characterized by the court as property.¹⁷ *Alenco v. FCC* definitively identified high cost support payments as property.

As in *Texas Office of Public Utility Counsel v. FCC*, the Fifth Circuit in *Alenco v. FCC* ruled that the “petitioners must wait to experience the actual consequences” of the loss of universal service support before the court would consider whether there was any loss of property effectuating an unconstitutional taking.¹⁸ New Florence has experienced the consequences of the loss of approximately \$140,000 in universal service support for September, October, November, and December of 2004, and is currently, pursuant to USAC’s ongoing suspension of payments, not being compensated for the provision of high cost universal service in the first weeks of January 2005.¹⁹

The Fifth Circuit has determined that high cost support is property.²⁰ Because of the MoPSC’s and USAC’s actions in response to FCC direction, New Florence has and is experiencing the loss of such property. As discussed in more detail below, this taking of property violates the Fifth and Fourteenth Amendments.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Even if the Commission were to immediately reimburse New Florence for its provision of universal service for the remainder of 2004, as discussed *supra*, New Florence’s losses in 2005 of approximately \$35,000 a month are and will continue to be “ripe” for judicial review as this proceeding progresses.

²⁰ Given the opportunity, the MoPSC did not address the “property” inquiry. In fact, by immediately making a due process argument, albeit a weak one, the MoPSC clearly understands that high cost support is indeed property. *See* MoPSC Comments at 1.

B. New Florence's Property and Due Process Rights Are Being Violated

The Fifth Amendment protects utilities such as New Florence from regulations that are “so unjust as to be confiscatory.”²¹ In its comments, the MoPSC shows the evolution of its USF certification process which has now evolved to the point where the MoPSC believes it can withhold certification without so much as an allegation that any USF funds have or will be misused. The application of this new MoPSC procedure has resulted in the withholding of New Florence's universal service payments, which provide the support necessary for New Florence to serve the high cost, sparsely-populated region of New Florence, Missouri, and is confiscatory. New Florence receives approximately \$65 per customer, per month, in total high cost support and this support is crucial to the maintenance and upgrading of the facilities needed to serve these customers.²²

The governmental taking of New Florence's high cost support compensation for its provision of universal service has a devastating economic impact on the ability of New Florence to stay in business, and denies expected support for the investments New Florence has made in the high cost, rural area of New Florence, Missouri. The U.S. Supreme Court uses three factors to analyze a takings claim: 1) the economic impact of the state action on the claimant; 2) the extent to which the action has interfered with distinct investment-backed expectations; and 3) the character of the governmental action.²³ With New Florence's loss of substantial amounts of high cost support due to the extremely high cost nature of its service area, New Florence meets the

²¹ *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

²² *Id.* at 308 (stating that if a state has taken utility property without paying just compensation, the state has violated the Fifth and Fourteenth Amendments).

²³ *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225 (1986).

first factor. Since New Florence's investment in the infrastructure necessary to provide telecommunications services in such a high cost area was predicated on the receipt of universal service support, New Florence is left with a stranded investment, meeting the second factor. Finally, since the withholding of New Florence's high cost support payments is based on *no evidence* whatsoever of any misuse of high cost funds by New Florence, only speculation and innuendo, the discontinuance of USF support is unjustified, which meets the final factor. Thus, the MoPSC denial of certification, and the FCC's resultant taking of New Florence's high cost support violates the Fifth Amendment.

The taking of New Florence's high cost support property rights also violates Fourteenth Amendment due process principles. In order to determine what procedural safeguards are necessary when property is taken, the U.S. Supreme Court examines the risk of erroneous deprivation of the property interest.²⁴ What is disconcerting about the MoPSC decision to deny certification is that the MoPSC has presumed something that has not been established – any past or threatened future misuse of high cost support. The MoPSC's comments contain absolutely no evidence of any wrongdoing or that New Florence has not used or would not continue to use its high cost support “only for the provision, maintenance, and upgrading of facilities and services for which the support is intended.”²⁵ In fact, based on recently submitted third-party audits of New Florence's accounts which the MoPSC acknowledges receiving, there is no evidence of any discrepancies intended to artificially inflate New Florence's high cost support. In the instant case, the risk of erroneous deprivation of New Florence's property is extremely likely in light of the MoPSC's glaring lack of substantiated evidence.

²⁴ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁵ 47 C.F.R. § 54.314.

The U.S. Supreme Court has held that it is a violation of procedural due process for a tribunal to foreclose issues by conclusively presuming them to be true.²⁶ This is exactly what the MoPSC has done by presuming that, prior to the conclusion of its investigations, New Florence has misused its universal service funds. The MoPSC provides not even a scintilla of evidence that New Florence has engaged in any such wrongdoing. The presumption that New Florence *may* be misusing its high cost support, without any evidence or affording New Florence its full evidentiary rights, and the application of that unsupported presumption in any way to immediately terminate USF support, violates New Florence's due process rights.

Finally, New Florence notes that the actions of the MoPSC do not take place in a vacuum. The MoPSC incredulously asserts that it need not "justify its decision or support its decision with evidence."²⁷ Aside from Constitutional provisions that mandate otherwise, the state of Missouri is equally troubled by this type of conduct. In Missouri, in order to meet the basic standards of due process and avoid being arbitrary, unreasonable, or capricious, an administrative agency's decision must be made using some kind of objective data rather than mere surmise, guesswork, or gut feeling.²⁸ The MoPSC's "gut feelings" about New Florence in this case is equally offensive to New Florence's due process rights in the state of Missouri.

²⁶ See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (holding that a statutory presumption that a pregnant school teacher was physically incapable of performing her duties was unconstitutional) (emphasis added).

²⁷ MoPSC Comments at 2.

²⁸ *Missouri Nat. Educ. Ass'n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266, 281 (Mo. Ct. App. W.D. 2000).

IV. The Withholding of High Cost Support While Finding New Florence Eligible to Continue to Receive Low Income Support is Arbitrary, Capricious and an Abuse of Discretion.

New Florence established in its Appeal that the underlying statutory authority for USF low income support is identical as that for high cost support. Finding the MoPSC withholding of certification insufficient to justify the withholding of low income USF support, the FCC cannot find it sufficient to cut off high cost support which is based upon the same statutory provision and FCC rules. Not surprisingly, the MoPSC chose not to address this legal argument either.

V. Conclusion

In light of the foregoing, New Florence respectfully submits that the record established by public comment clearly supports the relief requested. The law, the facts, and the public interest mandate the immediate reinstatement of USF support pending conclusion of the MoPSC investigation. Without prejudice to the foregoing, should the FCC find that support for 2005 should be delayed pending conclusion of the MoPSC investigation, it should immediately proceed to authorize payment of the remaining 2004 USF support.

Respectfully submitted,

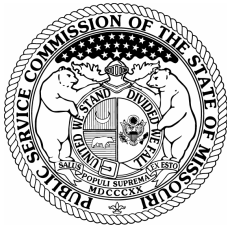
NEW FLORENCE TELEPHONE COMPANY

By /s/ Michael K. Kurtis
Michael K. Kurtis, Its Attorney

January 18, 2005

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Exhibit 1



PSC NEWS

Missouri Public Service Commission

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FY-05-131

PSC ACTS TO PROTECT CASS COUNTY AND NEW FLORENCE TELEPHONE SERVICE

***Matzdorff's guilty pleas create questions about the ownership
and operation of two small, rural telephone companies.***

Jefferson City (January 11, 2005)---The Missouri Public Service Commission is making every attempt to protect the telephone ratepayers of Cass County Telephone Company, LLP and New Florence Telephone Company, Inc. in light of a prominent telephone executive pleading guilty to federal charges.

"It is very important that we take whatever actions necessary to protect these telephone customers in order that they continue to receive quality service at just and reasonable rates," stated PSC Chairman Jeff Davis. "This could include placing someone on-site to monitor the day-to-day operations of both phone companies," added Davis.

Last Friday, Cass County Telephone Company executive Kenneth Matzdorff pleaded guilty in federal court in New York to one count of conspiracy to commit wire fraud and one count of conspiracy to money laundering in connection with what federal authorities believe involved a nationwide phone and Internet scheme that federal prosecutors have alleged is linked to organized crime. Matzdorff is a part owner of Cass County Telephone, LLP and one-third owner of Tiger Telephone, Inc. which owns 100% of New Florence Telephone, Inc.

The Commission first asked its staff to monitor the issues associated with the federal investigation in July 2004 and a preliminary report will be delivered to the Commission by the end of this month. Matzdorff's guilty pleas prompted the Commission to take additional actions prior to the issuance of the report.

The Commission has directed the PSC Staff to:

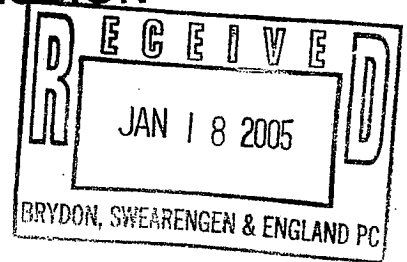
- * ensure that telephone customers of the Cass County Telephone Company and New Florence Telephone continue to receive safe and reliable telephone service and that they are not over-charged for that service;

- * conduct an independent review of the Companies' use of Federal Universal Service Funds;

- * determine whether or not Mr. Matzdorff gave false testimony before the Commission during a rate case hearing held before the Commission in April.

Exhibit 2

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



An Investigation of the Fiscal and)
Operational Reliability of Cass County)
Telephone Company and New Florence)
Telephone Company, and Related Matters)
of Illegal Activity)

Case No. TO-2005-0237

ORDER ESTABLISHING INVESTIGATION CASE

SYNOPSIS:

This order establishes a case within which the Staff of the Public Service Commission is directed to investigate all matters pertaining to the operations of two Missouri telecommunications utilities, Cass County Telephone Company ("Cass County") and New Florence Telephone Company ("New Florence"). These two utilities are either owned in part or operated by Ken Matzdorff who has recently plead, or is reportedly about to plead, guilty to certain felony fraud charges based primarily on charges of telephone cramming. As a result of this order, Staff is directed to investigate the continuing fiscal and operational reliability of telecommunications service for the customers of these companies.

FACTS:

1. On February 5, 2004, a docket was established to receive a Stipulation regarding the earnings of Cass County Telephone Company. Subsequent to the filing of the Stipulation, the Commission became aware of a federal indictment alleging that certain entities associated with Cass County shareholder and officer, Ken Matzdorff,

had been involved in a telecom cramming scheme. As a result of Commissioner concerns arising out of the indictment, an on-the-record presentation was conducted on April 19 at which Mr. Matzdorff appeared and testified. Ultimately, while it determined that the Stipulation should be allowed to go into effect, the Commission also expressed ongoing concerns regarding the allegations surrounding the Company and other companies associated with Mr. Matzdorff. As a result, the Commission noted its intentions to continue to monitor the developments regarding the allegations contained in the indictment.

2. On or about July 27, 2004, a federal arrest warrant was issued for Mr. Matzdorff. The affidavit underlying the warrant stated that Mr. Matzdorff "played an integral role, as an associate of the Gambino crime family" in a telephone cramming scheme, as well as an effort to launder the proceeds of both that scheme as well as a separate internet pornography scheme. Specifically, the affidavit indicated that Mr. Matzdorff was instrumental in establishing and operating USP&C, which was the primary vehicle used to place unauthorized charges on customer telephone bills (the cramming scheme). Furthermore, the affidavit indicates that Mr. Matzdorff was instrumental in the operation of LEC L.L.C., which was used as a vehicle for the laundering of proceeds realized as a result of the cramming scheme as well as proceeds realized as a result of the internet pornography scheme. LEC L.L.C. is the principal owner of Cass County Telephone. Finally, the affidavit indicates that Cass County overpaid for certain services provided by a company called Overland Data. The affidavit further stated that the practical effect of this overpayment was to defraud the federal Universal Service Fund ("USF") and that these defrauded funds were ultimately

laundered by the parent company, LEC L.L.C. and were distributed to Gambino associates.

3. On July 29, 2004, based upon the information contained within the Matzdorff arrest warrant, the Commission authorized its Staff to conduct an investigation surrounding the allegations contained in the arrest warrant. Specifically, the Commission sought information regarding whether Missouri customers or their rates would be affected by the allegations contained in the arrest warrant.

4. On September 30, 2004, the Commission, primarily as result of concerns regarding the allegations contained in the Matzdorff arrest warrant, declined to certify Cass County and New Florence for receipt of high-cost service support from the federal USF. Shortly thereafter, the Federal Communications Commission directed the Universal Service Administrative Company to immediately suspend monthly USF support payments to Cass County and New Florence.

5. Although the charges against Mr. Matzdorff had been temporarily withdrawn, newspaper articles indicate that Mr. Matzdorff has recently plead guilty in Brooklyn federal court to one count of conspiracy to commit wire fraud and one count of conspiracy to launder money. Moreover, subsequent media articles have indicated that Mr. Matzdorff intends to plead guilty in Kansas City federal court to another charge of defrauding the federal USF.

6. Furthermore, the United States government has given notice of its intent to seek criminal forfeiture of certain of Mr. Matzdorff's assets in accordance with Title 18, United States Code, Section 981 (a)(1)(C) and Title 28, United States Code, Section 2461(c). Inasmuch as this forfeiture could reach to operating capital or plant used by

telecommunications companies in Missouri, any potential forfeiture concerns the Commission.

7. As a result of the investigation authorized on July 29, 2004, Staff was anticipating that it would file its Report in the immediate future. Staff and the Commission have concerns, however, that certain information requested from LEC L.L.C. and other affiliated companies may not be forthcoming. Therefore, the Commission deems it appropriate to create a docket for the formal establishment of this investigation as well as the receipt of any Staff discovery problems, for the issuance of any necessary discovery orders, and in order to take additional actions found necessary to protect the customers of the telephone companies affected by these events aforesaid.

LEGAL AUTHORITY TO INTERVENE:

Based upon the Commission's general investigatory power specified in Sections 386.320, 386.330 and 392.250, in addition to specific authority over telecommunications companies found throughout Chapter 392 and set out *infra*, the Staff of the Commission is hereby directed to investigate all matters pertaining to operations of the companies, including assessment of the continuing fiscal and operational reliability of

telecommunications service for the customers of Cass County and New Florence.¹ This investigation includes extensive on-site review and inspections² and may include the need for a change of management and control of the companies by legal means.

Staff is hereby directed to complete a financial review concerning the receipt and disbursement of Universal Service Funds. Missouri statutes provide that:

Any person who shall willfully make any false entry in the accounts, books of account, records or memoranda kept by any corporation, person or public utility governed by the provisions of this chapter, . . . or who shall willfully neglect or fail to make full, true and correct entries . . . of all facts and transactions appertaining to the business of such corporations, . . . or who shall falsely make any statement required to be made to the public service commission, . . . shall be deemed guilty of a felony, and upon conviction shall be punished by a fine of not less than one thousand dollars nor more than five thousand dollars, or by imprisonment for not less than two years nor more than five years, or by both such fine and imprisonment.³

In addition, Section 386.570 provides that any person who violates any law, or who fails to obey any order is subject to a penalty of not less than \$100 nor more than \$2,000 for each offense. Every violation is a separate and distinct offense, and each day's

¹ The commission shall have the general supervision of all telegraph corporations or telephone corporations, and telegraph and telephone lines, as herein defined, and shall have power to and shall examine the same and keep informed as to their general condition, their capitalization, their franchises and the manner in which their lines and property, owned, leased, controlled or operated are managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with all the provisions of law, orders and decisions of the commission and charter and franchise requirements. Section 386.320.1 RSMo 2000.

The commission may, of its own motion, investigate or make inquiry, in a manner to be determined by it, as to any act or thing done or omitted to be done by any telecommunications company subject to its supervision, and the commission shall make such inquiry in regard to any act or thing done or omitted to be done by any such public utility, person or corporation in violation of any provision of law or in violation of any order or decision of the commission. Section 386.330 RSMo 2000.

² The commission shall have power, either through its members or responsible engineers or inspectors or employees duly authorized by it, to enter in and upon and to inspect the property, equipment, building, plants, factories, powerhouses, offices, apparatus, machines, devices and lines of any of such corporations or persons. Section 386.320.2 RSMo 2000.

³ Section 386.560 RSMo 2000. Mishandling records -- false statements -- penalty -- order provisions

continuance thereof shall be and be deemed to be a separate and distinct offense. Similarly, every officer or employee who aids or abets any violation is guilty of a misdemeanor and is punishable by a fine not exceeding \$1,000, or by imprisonment in a county jail not exceeding one year, or by both.⁴ Staff shall pursue evidence of any circumstances discovered during the course of its investigation.

Staff shall also review the conduct of the officers and employees of these companies to determine whether either company has suffered a financial loss, or other damage, as a result of illegal acts. Such a loss should include, but would not be limited to, the companies' loss of USF support. Any such loss, along with attorneys fees and punitive damages, should be recoverable by the company pursuant to Section 392.350.⁵ Circumstances which might support such an action shall be reported to the Commission and the company so affected. In addition, any telecommunications company officer or employee who violates certain provisions of Chapter 392 shall forfeit to the state a sum not to exceed \$5,000 for each day of a recurring offense and this, too, shall be investigated by Staff.⁶

Lastly, the Commission may impose any condition or conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest and consistent with the provisions and purposes of this chapter.⁷ This same statutory section provides that the Commission

⁴ Section 386.580 RSMo 2000 Employee of public utility guilt of misdemeanor, when

⁵ Section 392.350 RSMo 2000. See also, Overman v. Southwestern Bell Telephone Co., 675 S.W.2d 419 (Mo.App. 1984).

⁶ Section 386.360 RSMo 2000. Forfeiture - - penalties

⁷ Section 392.470 RSMo 2000 Conditions, commission may impose, when - - compensation to other companies, when, commission may order

may review any certificate of public convenience and necessity issued prior to September 28, 1987, and modify such certificate to impose any reasonable and necessary conditions authorized by this section. The certificates for these companies were both issued prior to that date.⁸

The primary concern of the Commission is the ongoing safe and reliable provision of telecommunications services to the citizens of Missouri. Staff's goal in this investigation should be to ensure the viability of those services. Furthermore, pursuant to the authority contained in Section 386.390, Staff shall be authorized to file complaints on any matters contained within the scope of this order and may further file such complaints or request the Commission authorize the filing of such complaints in this matter as it deems appropriate.

Given the scope of the investigation as set forth herein, the Commission has determined that this docket does not, at this time, meet the definition of a contested case as contained in Section 536.010. As such, the dictates of the Commission's *ex parte* rule are not applicable, and the Staff is directed to seek such additional clarification or authorization it deems appropriate to further the goals contained in this order.⁹ Furthermore, given the inapplicability of the *ex parte* rule, Staff is directed to meet with the Commission, either individually or in a properly noticed agenda session, for the purpose of bringing to light new events as they occur.

⁸ Cass County Telephone was in existence prior to establishment of the Public Service Commission, on April 15, 1913, and is deemed to be certificated as of that date. New Florence Telephone received its certificate on June 28, 1960.

⁹ To the extent that Staff seeks a resolution of a discovery matter or the issuance of subpoenas as discussed in paragraph 7, *supra*, those matters would involve a determination of legal rights and would be subject to the constraints of the *ex parte* rule.

IT IS THEREFORE ORDERED:

1. That case TO-2005-0237 be established for the purpose of the investigation of the financial and operational status of any certificated company in which Mr. Kenneth Matzdorff has any ownership interest or any operational control or influence resulting from his role as an officer or employee of such company.

2. That the Commission Staff shall undertake any discovery, audit, investigation, or other action it deems appropriate to investigate the financial and operational status of any certificated company in which Mr. Kenneth Matzdorff has any ownership interest or any operational control or influence resulting from his role as an officer or employee of such company.

3. That the Commission Staff shall investigate any matters pertaining to the Universal Service Fund and report any irregularities to the Commission.

4. That the Commission Staff shall file a status report on February 1, 2005, and every 30 days thereafter to inform the Commission of the status of its work herein.

5. That the Commission Staff is hereby authorized to file a complaint(s) on any matters contained within the scope of this order.

6. That this order shall become effective on January 28, 2005.

BY THE COMMISSION

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

Dale Hardy Roberts
Secretary / Chief Regulatory Law Judge

(S E A L)

Roberts, Chief Regulatory Law Judge,
by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri
on this 14th day of January, 2005.

STATE OF MISSOURI

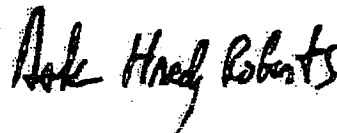
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and

I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City,

Missouri, this 14th day of January 2005.



Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

MISSOURI PUBLIC SERVICE COMMISSION

January 14, 2005

Case No. TO-2005-0237

Dana K Joyce
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Jefferson City, MO 65102

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200 Madison Street, Suite 640
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Cass County Telephone Company
Kenneth Matzdorff
P.O. Box 398
Peculiar, MO 64078

✓ New Florence Telephone Company
Trip England
P.O. Box 456
Jefferson City, MO 65102

Enclosed find a certified copy of an ORDER in the above-numbered case(s).

Sincerely,

A handwritten signature in black ink that reads "Dale Hardy Roberts". The signature is written in a cursive, slightly slanted style.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge